Supreme Court, U.S.
FILED

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IN THE UNITED STATES SUPREME COURT

DAVID H. N. BEAN
Appellant

V.

VIRGINIA STATE BAR
Appellee

(Virginia Supreme Court Record No. 050508)

CORRECTED PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

HAVE THE DUE PROCESS RIGHTS OF A LAWYER BEEN VIOLATED WHEN HIS LICENSE TO PRACTICE HAS BEEN SUSPENDED FOR CONDUCT NOT SPECIFICALLY ENUMERATED IN THE PROCEDURAL RULE HE IS ALLEGED TO HAVE VIOLATED?

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Constitutional Provisions, Statutes and Regulations

28 U.S.C. Section 2101(c) 1

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Virginia Sup. Ct. Rule 4:1(b)(4)(A)(1) 2,3,5,6

Cases

Marks v. United States, 430 U.S. 188, 97 S. Ct. 990, 51 L Ed 260 (1977) 13

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In Re Ruffalo, 390 U.S. 544, 88S. Ct. 1222, 20 L. Ed. 2d 117, 43 Ohio Op. 2d 459 (1968), reh'g den, 391 U.S. 961, 88 S. Ct. 1833, 20 L. Ed 2d 874 (1968) 7

U.S. v. Marsh, 84 F 3rd 110 (9th Cir.) 1998 7, 8

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Treatises

16A Am Jur 2d, Constitutional Law, Section 334 6

7 Am Jur 2d, Attorneys at Law, Section 2 6

JURISDICTION

This is an appeal from a ruling of the Virginia Supreme Court on an important question of federal law, which ruling was contained in an Order dated July 8, 2005 and the subsequent denial of a Petition for Rehearing dated September 23, 2005. This Corrected Petition is timely filed as it is being submitted within the sixty (60) day extension granted to the Petitioner after the filing of his original Petition, which was submitted within ninety (90) days from the denial of the Petition for Rehearing, in accordance with 28 U.S.C. Section 2101(c).

OPINIONS BELOW

The opinions below are set forth in the Order of the Virginia Supreme Court dated July 8, 2005 (Appendix p. 2) and the Order of Suspension of the Virginia State Bar dated December 20, 2004 (Appendix p. 6).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

1. 28 U.S.C. Section 2101

2. U. S. Constitution, Amendment 14

3. Virginia Supreme Court Rule 4:1(b)(4)(A)(1)

STATEMENT OF THE CASE

1. The Petitioner is a lawyer whose license to practice in Virginia was suspended for two years, effective November 10, 2005, for alleged violations of ethical standards which were in turn predicated on alleged violations of a discovery rule in the course of civil litigation.

2. The Action against the Petitioner was commenced by a Complaint to the Virginia State Bar by one Audrea Hite Wynn, II, M.D., a physician whom the Petitioner had previously designated as an expert witness in a medical malpractice case against another physician. The Petitioner gave a written

summary of the testimony he expected Dr. Wynn to provide, as required by the relevant discovery rule, to wit: Virginia Supreme Court Rule 4:1(b)(4)(A)(i), which states as follows:

> "A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion."

The summary provided by the Petitioner was based primarily on statements related to him by his client, James Robert Anderson, who had been the Complainant's patient, as to what the Complainant had told him her opinion was. More particularly, the Petitioner's client told him that the Complainant said of the Defendant doctor's work that "there was too much cut out [of his shoulder]", that the surgery was "unnecessary", and that the result was "so bad she wouldn't touch it", and she then referred him to a

specialist for pain relief. The Complainant was a medical doctor and a consulting physician to the client/patient. She gave a second opinion to him in laymen's terms which was highly critical of the surgery performed by the Defendant in the case, and this statement of the Complainant's opinion was relied upon by the Petitioner in preparing the summary of the Complainant's "expected testimony". The Complainant later denied holding that opinion and complained to the Bar. The Bar took the position that the Petitioner's designation of the Complainant and other experts learned of in the investigation of the Complainant's allegations, and his submission of summaries of their "expected testimony" without contacting the experts in advance or obtaining their agreement or consent violated the Rule and constituted ethical offenses as well.

3. The Petitioner contended in the hearing before the Virginia Disciplinary Board (among other

things) that the Discovery Rule he was alleged to have violated, Virginia Supreme Court Rule 4:1(b)(4)(A)(i), was unconstitutionally vague and ambiguous, on its face and as applied to him.

4. The Board rejected this position and on December 20, 2004 they issued an Order suspending the Petitioner's license for two years, notwithstanding the fact that the Petitioner had been a lawyer for thirty (30) years and had no prior disciplinary record.

5. That Order was timely appealed to the Virginia Supreme Court and its execution was stayed pending that appeal.

6. The Virginia Supreme Court upheld the Board's ruling and denied the Petitioner's appeal in an Order dated July 8, 2005 and denied Mr. Bean's Petition for Rehearing in an Order dated September 23, 2005. The Petitioner subsequently filed a Motion for Deferral of Mandate and Stay of Execution pending appeal to this Court, which was denied, and

the Board issued a new Order of Suspension dated November 10, 2005 and effective immediately.

7. The present Petition seeks review and reversal of the above-described rulings and reinstatement of the Petitioner's license to practice law in the Commonwealth of Virginia.

Q. Go right ahead.

ARGUMENT

The Petitioner contends, as he did below, that the Discovery Rule he is alleged to have violated, Virginia Supreme Court Rule 4:1(b)(4)(A)(i), is unconstitutionally vague and ambiguous, on its face and as applied to him.

1. His basis for this claim is this: While it is well settled that the regulation of professions in general is within the prerogatives of the states, and not violative of Due Process requirements, 16 Am Jur 2d, Constitutional Law, Section 334, 7 Am Jur 2d, Attorneys at Law, Section 2, In Re Peterson (BC, DC

Conn) 163 BK 665, 25 BCD 394, 30 CBC 1457 CCh Bankr. L. Rptr. Paragraph 75750, Wallace v. Wallace, 25 Ga 102, 166 SE2d 718, cert den 396 U.S. 939, 24 L Ed 2d 240, 90 S. Ct. 369, it is equally clear that a state cannot, in regulating the professions, ignore the rights secured by individuals in the Constitution, including the Due Process protections in the 14th Amendment. Due Process protections have, moreover, been specifically held by this Court to extend to attorneys in connection with the state regulation of the practice of law. See In Re Ruffalo, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117, 43 Ohio Op. 2d 459 (1968), reh'g den, 391 U.S. 961, 88 S. Ct. 1833, 20 L. Ed 2d 874 (1968). The essence of the "void-for-vagueness" doctrine is that a statute (or in this case a regulation) cannot be enforced if it is so vague as to leave an individual without knowledge of the nature of the activity that is prohibited (or required). U.S. v. Marsh, 84 F 3rd 110 (9th Cir.) 1998.

The statute (or regulation) must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited (or required) and provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement. Marsh, supra. The Rule states that when requested in discovery the litigants must designate the expert witnesses they intend to call at trial and summarize, inter alia, the "expected testimony" of each such expert. A logical reading of this requirement would seem to allow the attorney the option of providing a summary of "expected testimony" based on medical records, deposition testimony of the expert, the client and others, clients and witness interviews, and any other credible information gleaned from the attorney's investigation that would provide a reasonable basis for the expectation that the expert's testimony would be as stated when it is to be adduced in court. There is no requirement stated in the